93-484

Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ZADY NATEY, INC.,

Petitioner,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL NO. 27,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

Petition For A Writ of Certiorari

Warren M. Davison
Counsel of Record for Petitioner
John W. Kyle
LITTLER, MENDELSON, FASTIFF & TICHY
The World Trade Center, Suite 1653
Baltimore, Maryland 21202-3005
(410) 528-9545

Melvin J. Sykes
MARYLAND BAR CENTER, SUITE 310
520 West Fayette Street
Baltimore, Maryland 21201
(410) 727-3078

September 24, 1993

I

QUESTIONS PRESENTED FOR REVIEW

1. Did the Fourth Circuit err in holding, in conflict with Harry Hoffman Printing Company v. Graphic Communications International Union Local 261, 950 F.2d 95 (2d Cir. 1991), that a labor arbitrator's award that exceeded the authority conferred upon him by the collective bargaining agreement may be affirmed by the Court on a theory neither argued to the arbitrator nor addressed in the arbitrator's decision?

2. May a federal court, in the name of deference to labor arbitration awards, affirm an award that is inconsistent with established principles of federal labor law and policy under the National Labor Relations Act, does violence to the settled rights of employers under the law, and thereby violates public policy?

II

LIST OF PARTIES TO PROCEEDING BELOW

Plaintiff

Zady Natey, Inc.[1/]

Defendant

United Food and Commercial Workers International Union, Local 27

1/ Zady Natey, Inc. has no parent or subsidiary companies.

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The District Court's unreported opinion, issued June 30, 1992, is reproduced at App. A-20. The Court of Appeals opinion, reported at 995 F.2d 496 (4th Cir. 1993), is reproduced at App. A-1.

VI

JURISDICTION OF THIS COURT

The final judgment of the Court of Appeals in this matter was entered on June 29, 1993, and this petition has been timely filed as required by Rule 13 of the Rules of this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1991).

VII

STATEMENT OF THE CASE

This is a suit to vacate an award in an arbitration arising out of a collective bargaining agreement between Petitioner,

which had operated a meat processing plant in Maryland, and the Respondent. It raises important issues of federal labor policy concerning the scope of a federal court's power in regard to an arbitrator's award where the court concludes that the arbitrator's stated ground of decision exceeds the authority conferred on him by the parties' agreement.

On July 17, 1987, Petitioner sold all of its assets. Toward the end of the negotiations, the buyer announced that its willingness to purchase was conditioned upon the Petitioner's shutting down its operation and sending letters of termination to its employees. Petitioner entered into a written agreement warranting the

required promises, which were carried out as agreed.[2/]

Respondent thereafter filed a grievance pursuant to the collective bargaining agreement, contending in relevant part:

> Section 13 of our collective bargaining agreement with Mash's states that the agreement is to be binding on the parties and on their successors and assigns.[3/] We interpret that section of the agreement as imposing an obligation on Mash's to see to it that any would-be purchaser of the business, no matter in what form, whether it be through a sale of stock or a sale of assets, recognize the collective bargaining

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2/ The Respondent Union has at all times conceded that Petitioner was entitled to enter into and perform this agreement as a matter of federal statutory law. No charges were filed by the Union with the National Labor Relations Board under the unfair labor practice provisions of the Act, 29 U.S.C. § 151 et seq.

3/ The actual wording of the relevant language of Section 13 is " . . . Agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns" (App. 60).

> agreement, agree to abide by it, and guarantee the performance of its terms through its expiration on December 31, 1987.

(App. A-53.)

The grievance was litigated on October 25, 1988 before the arbitrator. On July 13, 1989, the arbitrator issued his decision and award holding that Petitioner had breached the agreement and requiring Petitioner to place the employees in the same position they would have been if the agreement had run to its termination. Specifically, the arbitrator concluded with respect to Section 13:

> The Successors and Assigns clause in the Contract is clear and unambiguous. It does not require convoluted definitions of the terms. Conway was a successor to Nathan Mash. There is no need for redundant language which would state that the Seller would sell only to a Buyer who would assume the Contract nor is there any sense to the proposition that no matter the working conditions offered by the Buyer in this case, the Seller is not liable

> under the clause if the Buyer does not employ a majority of the former employees.

(App. A-101-102.)

The arbitrator also criticized Petitioner for keeping the sales negotiations secret until after the negotiations was concluded, although the confidentiality of the negotiations did not contravene any provision of the agreement (App. A-106).

Petitioner sued under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, to vacate the arbitrator's finding on liability. Respondent counterclaimed for enforcement of the award.

On June 30, 1992, the District Court issued a final judgment denying Petitioner's motion to vacate, granting the Respondent's motion for summary judgment and enforcing the arbitrator's decision and award. The District Court agreed with Petitioner's contention that the language

of Section 13 could not sustain the arbitrator's construction of that section as a promise by Petitioner to sell its assets only to a buyer who would honor the contract: "Such an obligation is an extraordinary one which mere silence would not seem to imply" (App. A-35). The imposition of such "an extraordinary obligation," found by the Court to be without support in the language of the collective bargaining agreement and thus beyond the jurisdiction of the arbitrator, required the award to be vacated. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

However, the District Court set off in another direction. Borrowing from the Restatement (Second) of Contracts §§ 205 and 245[4/] -- which had never been raised by

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[4/] The cited sections of the Restatement (Second) of Contracts state as follows:

(continued...)

the parties or mentioned by the arbitrator -- the Court found that by exercising its right of silence about sales negotiations and its right to terminate its employees at the point of sale, Petitioner could have been found to have acted "to make it impossible for the successors and assigns clause to be performed" (App. A-35-36).

4/(...continued)

§ 205. Duty of Good Faith and Fair Dealing.

> Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

§ 245. Effect of a Breach by Non-Performance as Excusing the Non-Occurrence of a Condition

> Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.

Petitioner appealed to the Fourth Circuit, which affirmed. However, the Court of Appeals expressed yet another view of the merits, saying that, "at a minimum, Zady Natey had an obligation to make a good faith attempt to find a purchaser who would accept the agreement with the Union (or at least not to assist the purchaser to avoid the agreement)." (Emphasis added.)

Petitioner timely filed a petition for rehearing and suggestion of rehearing in banc. On June 29, 1993, the Fourth Circuit filed its Order (App. A-42) denying rehearing.

VIII

REASONS FOR ALLOWANCE OF THE WRIT

A. The Opinion Of The Court Of Appeals Demonstrates The Need For This Court To Clarify An Important And Recurring Issue Concerning The Scope Of The Federal Courts' Power To Review Labor Arbitration Awards, Because The Court Below Erred In Creating A Conflict With The Second Circuit By Affirming The Arbitrator's Award On A Theory Neither Argued To Nor Addressed By The Arbitrator After They Determined That The Arbitrator's Stated Ground Of Decision Was Without Support In The Language Of The Collective Bargaining Agreement.

In Enterprise Wheel & Car Corp., supra, 363 U.S. 593 (1960), and its companion cases,[5/] this Court set forth the standard for judicial review of a labor arbitration award. Such an award is to be enforced only where it "draws its essence from the collective bargaining agreement," 363 U.S. at 597. The arbitrator is

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5/ United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960), and United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

"confine[d] . . . to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice . . ." (Id.).

It was beyond the authority of the Courts below to create an entirely new theory of liability after rejecting the arbitrator's ground of decision as without support in the language of the agreement. Whatever deference was due the arbitrator ended at that point, and it remained only for the Court to vacate his award as excessive, as the Second Circuit did in Harry Hoffman Printing Company v. Graphic Communications International Union Local 261, 950 F.2d 95, 99 (2d Cir. 1991). In Hoffman, although some support might have been found for arbitration panel's award in certain sections of the agreement, the court held that once it was concluded that

the expressed ground for the award exceeded the panel's authority, the court had no alternative but to vacate. This conclusion follows from the agreement, which vests jurisdiction to construe its terms in the arbitrator and not in the courts.

B. If Left Undisturbed, The Opinion Of The Fourth Circuit Will Undermine Important And Settled Principles Of Federal Labor Policy Promulgated By This Court.

In a series of cases originating over 35 years ago, this Court has made clear that the rights and obligations that flow from collective bargaining agreements are to be determined by reference to uniform principles of federal law, fashioned from the policy of our national labor laws. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); NLRB v. C&C Plywood Corp., 385 U.S. 421, 430 (1967); Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249, 255-257 (1974); Allis-

Chalmers Corp. v. Lueck, 471 U.S. 202, 210-211 (1985). The decision below contravenes these principles in a number of significant respects.

First, it impairs the rights of an employer to cease operations and sell its assets. These rights are fundamental and widely recognized. Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 268 (1965)("an employer has the absolute right to terminate his entire business for any reason he pleases"); First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981)(employer's decision to shut down a part of its business for economic reasons is not a negotiable subject of collective bargaining).

Although an employer may waive these existing management rights, "clear and unmistakable" language is required before such a waiver may be found. Metropolitan

Edison Co. v. NLRB, 460 U.S. 693, 708-709 (1983). The Courts below correctly found that there was no such language in the agreement in this case.

Second, the Court found a violation of an implied duty of good faith and fair dealing on the basis of actions by Petitioner that Petitioner was entitled to take under existing law. One such action consisted of agreeing to terminate its employees. This right is conferred by Darlington Mfg. Co., supra (recognizing employer's right to terminate operations with attendant termination of employees)[6/];

[6/] The error of the Courts below appears to have arisen out of their mistaken belief that United Paperworkers International Union v. Misco, Inc., 484 U.S. 29 (1987), compelled them to search for a basis upon which they might sustain the arbitrator's award rather than to ensure that it was faithful to the language of the parties' agreement. This misreading of the Court's admonition in Misco (continued...)

Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182 (1973)(the policy of our federal labor law favoring "the rightful prerogative of owners independently to rearrange their businesses" quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 594 (1964)); NLRB v. Burns International Security Services, 406 U.S. 272, 287-288 (1972)(employer freedom inured to the benefit of our national economy by encouraging the creative restructuring of business enterprises and the resulting infusion of capital).

Another such action consisted of maintaining the secrecy of sales negotiations. This right was recognized in First National Maintenance Corp. v. NLRB, supra, 452 U.S. at 683 (decision to close for

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6/(...continued)
represents a further reason for this Court to grant review.

economic reasons found non-negotiable given the important need for confidentiality in an employer's pursuit of business opportunities and the likelihood that economic damage may result to the enterprise if disclosure to a labor organization of negotiations were to be required).[7/]

Given these principles of law, the Fourth Circuit was not free to say that by

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7/ See also Riedel International d/b/a Willmette Tug and Barge Co., 300 N.L.R.B. 282 (1990)(employer not required to disclose the existence of sales negotiations to union as disclosure may damage the viability of the operation and jeopardize the possibility of sale). Petitioner notes that although the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. § 2101(b), now provides for 60 days' notice to employees of certain plant closings or mass layoffs, employers retain the discretion to provide 60 days' pay to these employees rather than to disclose the existence of sales negotiations that are deemed confidential. WARN, incidentally, did not take effect until long after the events in this case occurred.

its actions Petitioner had breached an implied duty of good faith and fair dealing. Petitioner's conduct was not only within the policy of the law, it was favored by that policy. The Fourth Circuit's opinion thus itself violated federal labor policy and, if not reversed by this Court, will subvert important rights that have been guaranteed to employers, in the national interest.

Third, the decision below contravenes the established policy of federal labor law allowing a buyer of assets to choose for himself whether to hire all, some or none of the seller's existing work force, assuming that they will work under his terms. The Court erroneously concluded that Petitioner had wrongfully "assist[ed] the purchaser to avoid the agreement." The Court's conclusion is erroneous as a matter

of fact and law.[8/] If the buyer opts not to hire the seller's employees as he is entitled to do, he will not acquire the successorship obligation to bargain with the union. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 41-42 (1987).

Indeed, because the buyer here had opted not to hire a majority of its work force from among the Petitioner's former unionized employees, it was legally precluded from recognizing the Respondent Union and adopting the collective bargain-

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[8/] Petitioner's termination of employees did not prevent the buyer from becoming a successor. On the contrary, it facilitated the possibility of successorship as the buyer was then able to, and did, go on to hire as many of the individuals previously employed by Petitioner as it wished. Although the buyer ultimately hired fewer than a majority of its work force from among Petitioner's former employees, thereby avoiding successor status under the law, Petitioner had no control over, or responsibility for, the hiring decisions made by the buyer.

ing agreement, since the union did not enjoy, and had never enjoyed, majority status among the buyer's employees. Int'l Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961). It was, therefore, beyond the power of either the arbitrator or the courts to find that Petitioner had an obligation to demand that the buyer adopt the collective bargaining agreement and recognize the union. Such a demand would have been patently unlawful, and the Fourth Circuit's suggestion that Petitioner should have acted to impose the agreement on the buyer violates the prior holdings of this Court and of the National Labor Relations Board regarding unlawful assistance to a union in violation of Section 8(a)(2) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(2) and (1).

Fourth, the practical effect of the Fourth Circuit's opinion is to severely

restrict the market for the sale and purchase of businesses. A great number of existing collective bargaining agreements contain some form of successorship clause.[9/] Under the Fourth Circuit's view, employer-sellers will be forced to limit their sales of assets to purchasers who are willing to hire the existing work force, recognize the union and adopt the collective bargaining agreement. Such a result contravenes the expressed policy of our national labor law favoring the free alienability of property and the right of owners to efficiently arrange their businesses. In addition, a buyer's freedom to decide whether or not to be a successor and its

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9/ A recent survey has concluded that 43% of all collective bargaining agreements contain a successorship clause. BNA, Collective Bargaining Negotiations and Contracts, Vol. 2, Basic Patterns in Union Contracts, 36:5 (March 19, 1992).

absolute right not to adopt an existing agreement, Howard Johnson, supra, 417 U.S. at 262, will be effectively impaired by the substantial threat of potential liability upon the seller and the resulting chilling effect on business sales.

Finally, the amorphous nature of the implied obligation imposed upon Petitioner by the Fourth Circuit is destabilizing because employers will be unable to discern what sales-related conduct might be thought to violate the court-created implied duty of good faith and fair dealing. This result is not only inconsistent with the language of the parties' agreement in this case, which precluded even the arbitrator from modifying or adding to the terms of the agreement (App. A-59), it is directly contrary to the policy of federal labor law favoring uniformity and certainty in the interpretation of collective bargaining

agreements. Allis-Chalmers v. Lueck, supra, 471 U.S. at 210-211.

For all of these reasons, the opinion of the Fourth Circuit is inconsistent with public policy and has great potential for harm. It would be appropriate for this Court, therefore, to grant review and to vacate the award under the standards set forth in United Paperworkers International Union v. Misco, supra, both because of the ultra vires nature of the arbitrator's finding and because of the harms associated with the Courts' subsequent disregard of preeminent principles of federal labor policy.

IX

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

Warren M. Davison
Counsel of Record for Petitioner
John W. Kyle
LITTLER, MENDELSON, FASTIFF & TICHY
The World Trade Center, Suite 1653
Baltimore, Maryland 21202-3005

Melvin J. Sykes
MARYLAND BAR CENTER, SUITE 310
520 West Fayette Street
Baltimore, Maryland 21201
(410) 727-3078

368.203.CM

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Zady Natey, Incorporated, Plaintiff-Appellant, v. United Food and Commercial Workers International Union, Local No. 27, Defendant-Appellee.	)	**No. 92-1895**

Appeal from the United States District Court for the District of Maryland, at Baltimore.
J. Frederick Motz, District Judge.
(CA-91-3242-JFM)

Argued: March 1, 1993

Decided: June 1, 1993

Before PHILLIPS and MURNAGHAN, Circuit Judges, and HILL, Senior Circuit Judge of the United States Court of Appeals for the Eleventh Circuit, sitting by designation.

Affirmed by published opinion. Judge Murnaghan wrote the opinion, in which Judge Phillips joined. Senior Judge Hill wrote a concurring opinion.

COUNSEL

ARGUED: Warren Malcolm Davison, LITTLER, MENDELSON, FASTIFF & TICHY, Baltimore, Maryland, for Appellant. Joel Allen Smith, KAHN, SMITH & COLLINS, P.A., Baltimore, Maryland, for Appellee. **ON BRIEF:** John W. Kyle, LITTLER, MENDELSON, FASTIFF & TICHY, Baltimore, Maryland, for Appellant.

OPINION

MURNAGHAN, Circuit Judge:

Zady Natey, Inc. challenges an order of the district court affirming an arbitration award in favor of the United Food and Commercial Workers International Union, Local 27. The arbitrator ruled that Zady Natey, as the seller of the assets of a business, Mash's Inc.,[1] was liable under an extant "successors and assigns" clause[2] in

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[1]Mash's Inc. thereupon changed its name to Zady Natey, Inc., allowing the purchaser to obtain the business' name.

[2]"This agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns."

a collective bargaining agreement for damages caused by the failure of the purchaser to assume Zady Natey's obligations to its employees for the duration of the agreement. In granting the Union's motion for summary judgment and entering an order enforcing the arbitrator's award, the district court found that Zady Natey had certain obligations as a result of its agreement with the Union and that it had taken "affirmative steps, prior to the consummation of the sale and while it was still bound by the collective bargaining agreement, to make it impossible for the successors and assigns clause to be performed." Zady Natey was deemed responsible to satisfy those obligations. Zady Natey has appealed.

Zady Natey has cast its appeal around a decision of the Supreme Court holding

that, in the context of an issue over obligation to bargain, a purchaser of assets, though a successor or assign, was not responsible for substantive provisions of its predecessor's collective bargaining agreement unless it also hired a majority of its predecessors' employees. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987). We have here in the instant case, of course, a fact specific decision, dependent on what the parties (a seller and the Union) intended when the words "successors and assigns" were agreed upon and actually used in an agreement clearly in force. We must ask what duties attached to the seller as a result of entering such an agreement.

The arbitrator interpreted the successors and assigns clause as extending to the description of, though not the obligations

of, the purchaser of Mash's Inc.'s assets. Therefore, when the purchaser of Mash's assets refused to be bound, the arbitrator found the term to cause liability on the part of Zady Natey (the changed name of Mash's Inc.) which had by contract promised that successors and assigns would carry out the collective bargaining agreement terms. The collective bargaining agreement, from 1970 forward until expiration on December 21, 1987, a date about six months after the sale of Mash's Inc.'s assets, uniformly contained language making it applicable to Mash's Inc., its successors and assigns.

In the negotiations which brought about the sale, a stock purchase was considered, but ultimately, for tax reasons, the purchaser insisted on, and achieved, an assets purchase agreement. The purchaser refused to indemnify Mash's Inc. for conse-

quences of the sale concerning its employees and insisted on the secrecy of the assets sale prior to closing. As a condition precedent to the closing of the sale, Mash's Inc. agreed to cease operations, fire its employees, and change its name to Zady Natey, Inc. After closing, the new owners later reopened the facility and rehired a small number of Mash's previous employees. Since not all of the terms of the collective bargaining agreement were adopted by or complied with by the purchaser of Mash's assets, including its name, the Union representing the employees asserted a claim against Zady Natey. An arbitration ensued which the Union won.

The arbitrator specifically rejected Zady Natey's view that only a successor as described in Fall River Dyeing, supra, could be a successor under the collective

bargaining agreement. Zady Natey appealed to the district court for the District of Maryland.

Upon review of cross-motions for summary judgment, the district judge granted summary judgment in favor of the Union and against Zady Natey. It first determined that the arbitrator did not ignore the language of the collective bargaining agreement when he found that the purchaser of assets was a successor. The court further determined that Zady Natey took affirmative steps to frustrate the performance of the successors and assigns language.

The district court, in granting summary judgment in favor of the Union, determined that the arbitrator did not "ignore[] the plain language of the collective bargaining agreement in finding that new

Mash's [the purchaser of assets] is a 'successor' within the meaning of the agreement even though it was not a 'successor' within the meaning of Fall River Dyeing."

On appeal, we review the district court's grant of summary judgment to the Union de novo. However, our review of the arbitrator's decision is a very limited one. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 568 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596, 599 1960) ("It is the arbitrator's construction [of the collective bargaining agreement] which was bargained for; and so far as the arbitrator's decision concerns [the] construction of the contract, the courts have no business overruling him

because their interpretation is different from his.").

The Supreme Court recently stressed the narrowness of that review in United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 38 (1987):

> The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract . . . .[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

While the "arbitrator's award can and should be overturned if the arbitrator exceeds his authority," the "award is presumed to be legitimate as long as it draws its essence from the collective bargaining agreement." Roy Stone Transfer

Corp. v. Teamsters, Chauffeurs, etc. Local Union No. 22, 752 F.2d 949, 951 (4th Cir. 1985)(emphasis added).

Zady Natey has contended that the arbitrator, in interpreting the successors and assigns clause,[1] exceeded his authority because the term "successor" has a single meaning within labor law, as enunciated by the Supreme Court in Fall River Dyeing, supra, that meaning should have been imparted to the agreement it entered with the Union.

In Fall River Dyeing, the Supreme Court considered when a new employer, succeeding in another's business, has an obligation to bargain with the union representing the predecessor's employees. The Court offered a two-part answer to that question: the Court first outlined the proper approach to be taken to determine

whether a new company was a successor to the old, and then it explained when a successor had an obligation to bargain. The Court concluded that a new company is a successor if it has "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.'" 482 U.S. at 43 (quoting Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973)). If it is indeed the successor to the old company, a new company has an obligation to bargain with the union if it employs a majority of the predecessor's employees. 482 U.S. at 46 (citing NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272, 278-279 (1972)).

In the present case, the new company did acquire substantial assets of its predecessor and continued, without substan-

tial change, its predecessor's business operations. Thus, under Fall River Dyeing, the purchasers of Mash's Inc. appear to be successors to Zady Natey. But, even if they were not successors, Zady Natey had nevertheless contracted to provide those things which somebody as a successor would provide.

Whether, as a successor, the purchaser would be bound to bargain, independently of the substantive provisions of the predecessor's agreement, is a quite distinct question from whether the seller, who was a party to the agreement, would be bound. The determinative question, therefore, is whether the failure of Zady Natey to sell to a successor who would bind itself to adhere to the substantive terms of the collective bargaining agreement forced Zady

Natey to remedy the resulting disadvantage to its employees.

The arbitrator's answer to that question, that Zady Natey was liable under the agreement, drew its essence from the collective bargaining agreement. First, the literal language refers to "heirs, executors, administrators and assigns," indicating, as the district court pointed out, "that the parties intended that the section should be construed generically, i.e. to apply to all persons who followed in the footsteps of old Mash's." Second, Nathan Mash's[3] attorney testified that "there was no contemplation of any change or successors being involved unless he died" which also suggests that the parties were using the language in a generic sense. Third, if

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[3]He was the founder and owner of Mash's Inc.

the successors and assigns clause was read as Zady Natey has proposed, it would be mere surplusage. Finally, no other provision in the agreement suggests that the parties intended to use the word successor in the extremely limited sense urged by Zady Natey. Lawyer usage of the term is common and more inclusive.

In light of the foregoing, the district court's conclusion appears sound:

> Under these circumstances the term "successor" was, at most, ambiguous, and the arbitrator acted well within his authority in interpreting it as applying to anyone who followed old Mash's [Zady Natey] . . . Therefore, under section 13 (as permissibly construed by the arbitrator) old Mash's agreed that anyone who might purchase its stock or assets or otherwise succeed it would be bound by the agreement whether or not he would be bound to the agreement as a matter of labor law. By entering into that agreement old Mash's could not, of course, bind the purchaser. However, the question presented here is not whether new

> Mash's, as purchaser, was bound by the collective bargaining agreement but whether Zady Natey, as the seller, was under a contractual obligation when it breached.

Thus, at a minimum, Zady Natey had an obligation to make a good faith attempt to find a purchaser who would accept the agreement with the Union (or at least not to assist the purchaser to avoid the agreement).

The Union has contended that the collective bargaining agreement imposed an affirmative obligation upon Zady Natey to find a successor who was willing to assume Zady Natey's obligations under the collective bargaining agreement. The district court was hesitant to infer from the bare successors and assigns clause an affirmative obligation actually to succeed in finding a purchaser who would continue the agreement. It reasoned that "[s]uch an

obligation is an extraordinary one which mere silence would not seem to imply." Instead, it concluded, and we agree, that the collective bargaining agreement at least obliged Zady Natey to act in good faith with respect to its employees when selling the business. Since Zady Natey has failed to fulfill the duty of good faith and fair dealing, it is not necessary for us to determine whether Zady Natey should be held to the higher standard advanced by the Union even if good faith efforts to find a purchaser were made but proved unsuccessful.

The district court effectually summarized how Zady Natey failed to act in good faith with respect to the Union:

> Zady Natey did not simply fail affirmatively to find a purchaser who would continue its agreement with the Union. Rather, in order to maximize the price which Nathan Mash received for the sale

> of its assets, Zady Natey took affirmative steps, prior to the consummation of the sale and while it was still bound by the collective bargaining agreement, to make it impossible for the successors and assigns clause to be performed. Specifically, as a condition of the sale, it discharged all of its employees before the sale was closed for the very purpose of assuring that new Mash's would not be bound by the collective bargaining agreement despite section 13's mandate to the contrary. It also agreed to keep the proposed sale secret, thereby precluding the Union from attempting to obtain an injunction against its consummation.

Zady Natey has challenged the district judge's ruling on the ground that his reasoning was not precisely that forwarded by the arbitrator in granting the award. The district court, however, recognized that "the arbitrator did not articulate his ruling in precisely that fashion," i.e., as a violation of the duty of good faith and fair dealing which was part of the employ-

er's obligation under the collective bargaining agreement. "Instead, offended by what he perceived as Zady Natey's and Mash's bad faith, [the arbitrator] railed against their conduct in somewhat vehement, rather than coolly analytical, language." But, the district judge correctly ruled that "that fact alone . . . provided no basis for overturning the arbitrator's award." See, e.g., Enterprise Wheel, 363 U.S. at 598.

The district court's grant of summary judgment in favor of Local 27 and against Zady Natey is

AFFIRMED.

HILL, Senior Circuit Judge, concurring:

Because I conclude that the arbitrator drew his conclusions from the essence of

the agreement at issue, I concur in the judgment enforcing the award. Whether or not I should have reached the conclusions reached by the arbitrator is of no moment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ZADY NATEY, INC.	*	
	*	
v.	*	Civil No. JFM-91-3242
	*	
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION LOCAL NO. 27	*	

* * * * *

OPINION

Zady Natey, Inc. seeks to vacate an arbitration award entered in favor of United Food and Commercial Workers International Union, Local No. 27 (the "Union") and against it. At issue is whether Zady Natey, as the seller of the assets of a business, is liable under a successors and assigns clause in a collective bargaining agreement for damages caused by the failure of the purchaser to assume Zady Natey's obligations under the agreement. Zady

Natey and the Union have each moved for summary judgment.

I.

Nathan Mash was the owner of Mash's, Inc. ("old Mash's"), a Maryland corporation engaged in the business of marketing dressed hams, corned beef and other meat products at sites in Baltimore and Landover, Maryland. The Union represented production workers at the Landover facility since early 1970. Over the years, old Mash's and the Union entered into a series of collective bargaining agreements. The latest of those agreements ("the Agreement") became effective April 10, 1985 and expired December 31, 1987. Section 13 of the Agreement provided: "This Agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns."

On July 17, 1987, approximately five months prior to the Agreement's expiration, Nathan Mash sold the assets of old Mash's to a group of investors headed by Terrance Conway for approximately $10,000,000. Approximately twelve draft agreements were exchanged between old Mash's and Conway. Originally, the parties contemplated a stock purchase agreement but decided on an assets purchase agreement for tax reasons. Conway refused to indemnify old Mash's for consequences of the sale concerning its employees and insisted on the secrecy of the assets sale prior to closing.

Under the terms of the asset purchase agreement, old Mash's agreed that as conditions precedent to the closing of sale, it would cease operations, notify its employees that their employment with old Mash's was terminated and change its name to Zady Natey, Inc. At closing Conway assumed

control of the assets of old Mash's, including its corporate name ("new Mash's"). He immediately notified the existing employees that the new corporation would be reopening the Landover facility at a later time, under new terms and conditions of employment, and that employees were free to apply for work under the new management.[1/]

On July 21, 1987, the Union wrote to Zady Natey, informing it that the assets sale violated section 13 of the Agreement because it had failed to obtain new Mash's agreement to continue the terms of the Agreement through its expiration. Zady

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1/ In fact, only 39 of the 138 old Mash's eligible employees on the payroll as of July 17, 1987 were ultimately hired by new Mash's. The Union filed two unfair labor charges against new Mash's, alleging that it had discriminatorily refused to hire former production employees of old Mash's because of their union membership. These charges (to which Zady Natey was not a party) were settled before the legal issues which they raised were decided.

Natey denied that section 13 imposed such an obligation or that the grievance was arbitrable. The arbitrability question was litigated in this Court and was resolved in favor of the Union. See United Food and Commercial Workers Int'l Union, Local 27 v. Zady Natey, Inc., et al, Civ. No. PN-87-1956 (1987). On October 25, 1988, an arbitration hearing was held, and on July 13, 1989, the arbitrator issued his award in favor of the Union. This action followed.[2/]

II.

In the Steelworkers trilogy, the Supreme Court made clear that courts play an extremely limited role when asked to

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[2/] The reason for the delay in the filing of this action was that a second arbitration hearing on the issue of damages was conducted, and the arbitrator issued his award in that proceeding on October 28, 1991. No appeal has been taken from his damages determination.

review the decision of an arbitrator. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 568 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). More recently, in Misco, Inc., the Supreme Court reaffirmed the narrowness of this review:

> The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.
>
> . . . [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

United Paperworkers Int'l Union, AFL-CIO, et al. v. Misco, Inc., 484 U.S. 29, 38 (1987); see also Roy Stone Transfer Corp. v. Local 22, Teamsters, 752 F.2d 949, 951

(4th Cir. 1985) (award affirmed because no evidence in record that arbitrator "totally incorrect" in interpretation and application of the collective bargaining agreement).

Nevertheless, a court's deference does not completely insulate arbitral awards from judicial review. While an arbitrator is free to interpret ambiguous provisions in a collective bargaining agreement, he may not ignore its plain language. Ficks Reed Co. v. Local 112 Int'l Union, Allied Indus. Workers of America, 771 F. Supp. 208, 211, 214 (S.D. Ohio 1991); accord Sears, Roebuck and Co. v. Teamsters Local Union No. 243, 683 F.2d 154, 155 (6th Cir. 1982), cert. denied 460 U.S. 1023 (1983); Inter-City Gas Corp. v. Boise Cascade Corp., 845 F.2d 184, 187 (8th Cir. 1988) (arbitrator amends or alters agreement if interprets unambiguous language in way

different from plain meaning). The test is whether "the arbitrator's award 'draws its essence from the collective bargaining agreement,' and is not merely 'his own brand of industrial justice.'" Misco, Inc., 484 U.S. at 36 (quoting Enterprise Wheel & Car Corp., 363 U.S. at 596).

III.

In rendering his decision in favor of the Union, the arbitrator found, in part, that new Mash's was a successor to old Mash's within the meaning of section 13 of the collective bargaining agreement. Zady Natey challenges this finding, contending that the term "successor" has a single meaning under labor law, and that new Mash's was not a successor within the meaning of the collective bargaining agree-

ment because it did not hire a majority of old Mash's employees.[3/]

It is true, as Zady Natey posits, that the Supreme Court has held that for the purpose of determining whether a purchaser of the assets of a business may be required to bargain under a collective bargaining agreement entered into by the seller, he is deemed to be a "successor" only if, in continuing the operation of the business, he hires a majority of the seller's employees. See Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987). However, the Supreme Court has also stated (in

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3/ Although the parties have focused upon the question of whether new Mash's is a successor under section 13 of the collective bargaining agreement, that question itself is legally immaterial. Rather, what needs to be determined, as the first step of analysis, is the somewhat broader question of what "successor" means within the intendment of section 13. However, since the two questions merge, and to answer the former answers the latter, I will address the issue as framed by the parties.

language which it has not repudiated in Fall River Dyeing or elsewhere) that "[t]here is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others." Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249, 263 n.9 (1974).[4/]

Thus, the initial question here presented is whether the arbitrator ignored the plain language of the collective bargaining agreement in finding that new Mash's is a "successor" within the meaning of the agreement even though it was not a "successor" within the meaning of Fall

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[4/] Although it is not self-evident from the quoted language itself, it is clear from its surrounding context that when the Court said "in every legal context," it meant "every legal context" within labor law, not labor law as a "legal context" different from some other substantive area of the law.

River Dyeing. Four facts demonstrate that he did not do so. First, Fall River Dyeing had not even been decided when the collective bargaining agreement between old Mash's and the Union was first negotiated. Second, no other provision in the agreement suggests that the parties were intending to use the term "successor" only in the extremely limited sense by which it is defined for the purpose of determining a purchaser's obligations under a collective bargaining agreement.[5/] Third, section 13

[5/] The arbitrator found, and the Union argues, that if the successors and assigns clause were interpreted as referring merely to a successor within the meaning of Fall River Dyeing, the clause would be mere surplusage. This would be an additional reason for upholding a broader reading of the clause. See generally 1 Bornstein & Gosline, Labor and Employment Arbitration 14.02[1][d] (1992). Zady Natey argues that this is not so because in the early 1970s when the collective bargaining agreement was first negotiated, a successors clause could be held to bind a purchaser to a collective bargaining agree-

(continued...)

also refers to "heirs, executors administrators and assigns," evidencing that the parties intended that the section should be construed generically, i.e. to apply to all persons who followed in the footsteps of Old Mash's. Fourth, Harry Adelberg, the attorney who represented Nathan Mash when

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5/(...continued)
ment. See, e.g., Burns Int'l Detective Agency, Inc., 182 N.L.R.B. 348 (1970), enforced in part, 441 F.2d 911 (2d Cir. 1971) aff'd as modified, 406 U.S. 272 (1972). Moreover, according to Zady Natey, even after the Supreme Court reversed the NLRB's ruling in Burns, NLRB v. Burns Int'l Security Service, Inc., 406 U.S. 272 (1972), and even after Howard Johnson Co. v. Detroit Local Joint Executive Branch, supra, was decided, a successors clause was relevant in determining whether a purchaser could be forced to go to arbitration. See, e.g., Bartenders & Culinary Workers Union v. Howard Johnson Co., 535 F.2d 1160, 1172 (9th Cir. 1976); Local 111 Joint Board Nursing Home Employees v. B&K Investments, Inc., 436 F. Supp. 1203 (S.D. Fla. 1977). There seems to be merit in Zady Natey's argument. However, I need not decide the issue since my affirmance of the arbitrator's decision does not turn upon whether Zady Natey's reading of section 13 would render it meaningless.

the collective bargaining agreement was originally negotiated, testified at the arbitration hearing (on behalf of Zady Natey) that the successors and assigns clause -- which had been proposed by the Union -- "appeared to be completely innocuous as far as he [Mr. Mash] was concerned since "there was no contemplation of any change or successors being involved unless he died." This too suggests that the parties were using the "heirs, executives administrators, successors and assigns" language in a generic, not a restricted, sense.

Under these circumstances the term "successor" was, at most, ambiguous, and the arbitrator acted well within his authority in interpreting it as applying to anyone who followed old Mash's, whether or not he was a "successor" within the meaning of Fall River Dyeing. Therefore, under

section 13 (as permissibly construed by the arbitrator) old Mash's agreed that anyone who might purchase its stock or assets or otherwise succeed it would be bound by the agreement whether or not he would be bound to the agreement as a matter of labor law. By entering into that agreement old Mash's could not, of course, bind the purchaser itself. See, e.g., Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. at 258 n.3. However, the question presented here is not whether new Mash's, as purchaser, was bound by the collective bargaining agreement but whether Zady Natey, as the seller, was under a contractual obligation which it breached.[6/]

[6/] I note that almost all of the cases which the parties have cited both before the arbitrator and in this court have concerned the question of the liability of the purported successor under the collective bargaining agreement. Howard Johnson itself addressed that question. (continued...)

The Union contends that section 13 may be permissibly interpreted as imposing an affirmative obligation upon Zady Natey to find a successor who was willing to assume Zady Natey's obligations under the collective bargaining agreement. There is some authority to support this view. See, e.g., Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO v. Owens-Illinois, Inc., 758 F. Supp. 962 (D.N.J. 1991); Boardman Co. v. United Steelworkers of America, 91 Lab. Arb. (BNA) 489 (1988) (Harr, Arb.); see also Association of Flight Attendants, AFL-CIO v. Delta Air Lines, Inc., 879 F.2d 906 (D.C. Cir. 1989); cert. denied, 110 S. Ct. 1781 (1990) (hold-

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6/(...continued)
However, it is also noteworthy that in Howard Johnson the sellers "admitted that they were required to arbitrate in accordance with the terms of the collective-bargaining agreements they had signed." 417 U.S. at 253.

ing that the meaning of the successors and assigns clause was arbitrable). There is, however, other authority to the contrary. See e.g., Wyatt Mfg. Co., 82 Lab. Arb. (BNA) 153 (1983) (Goodman, Arb.); National Tea Co., 59 Lab. Arb. (BNA) 1193, 1997-98 (1972) (Joseph, Arb.). The law of the Fourth Circuit is not entirely clear. While in a mining operation case the Court ruled in favor of a union bringing suit against the seller for failure to find a purchaser willing to continue the collective bargaining agreement, it did so only in the face of express language in the applicable agreement providing that the mining operation "shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement." Dist. 17, Dist. 29, Local Union

7113, & Local Union 6023, UMWA v. Allied Corp., 765 F.2d 412, 417 (4th Cir.), cert. denied, 473 U.S. 905 (1985); accord, Int'l Union UMWA v. Eastover Mining Co., 603 F. Supp. 1038, 1040, 1044-45 (W.D. Va. 1985).

I would be hesitant to uphold an arbitrator's interpretation of a collective bargaining agreement inferring from a bare successors and assigns clause an affirmative obligation to find a purchaser who will continue the collective bargaining agreement. Such an obligation is an extraordinary one which mere silence would not seem to imply. Here, however, Zady Natey did not simply fail affirmatively to find a purchaser who would continue its agreement with the Union. Rather, in order to maximize the price which Nathan Mash received for the sale of its assets, Zady natey took affirmative steps, prior to the consummation of the sale and while it was

still bound by the collective bargaining agreement, to make it impossible for the successors and assigns clause to be performed. Specifically, as a condition of the sale, it discharged all of its employees before the sale was closed for the very purpose of assuring that new Mash's would not be bound by the collective bargaining agreement despite section 13's mandate to the contrary. It also agreed to keep the proposed sale secret, thereby precluding the Union from attempting to obtain an injunction against its consummation.

These facts fully substantiate a finding that Zady Natey breached a duty of good faith and fair dealing which was part of its obligation under the collective bargaining agreement. See generally Restatement of Contracts (Second), §§ 205 &

245.[1] The arbitrator did not articulate

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[1] Zady Natey argues that the principles set forth in the Restatement prohibiting a party from taking steps to render impossible the performance of a provision of a contract into which it has entered should not be incorporated into labor law. It has cited no authority in support of its position, and reason certainly does not substantiate it. Indeed, the interest of preserving stability in labor relations supports rather than undercuts the implication of a duty requiring a party to refrain from acting in bad faith.

Two other arguments advanced by Zady Natey are equally without merit. First, it contends that old Mash's was entitled to discharge its employees prior to the closing of the sale under Section 1B of the collective bargaining agreement which reserved to it the right "to relieve employees from duty because of lack of work or other legitimate reason, subject only to such limitations are provided in this Agreement." The arbitrator certainly was not obligated to conclude that discharging employees for the purpose of avoiding the successors and assigns clause was a "legitimate reason" within the meaning of this section. Second, Zady Natey hypothesizes that it could have sold the assets without first discussing with Terrance Conway any union related matters and that Conway could have discharged the employees immediately after the closing of the sale without being bound by the collective bargaining agreement. That is entirely true. However, it does not follow, as Zady Natey argues, that

(continued...)

his ruling in precisely that fashion. Instead, offended by what he perceived as Zady Natey's and Mash's bad faith, he railed against their conduct in somewhat vehement, rather than coolly analytical, language. That fact alone, however, provides no basis for overturning the arbitrator's award. See, e.g., Enterprise Wheel & Car Corp., 363 U.S. at 598. The gravamen of his ruling was on the mark, and his interpretation of the collective bargaining agreement -- as prohibiting Zady Natey from becoming an accomplice in the frustration

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[1/](...continued)
this justifies the contrary action which Zady Natey and Nathan Mash in fact took. They did discuss labor matters with Conway prior to the closing (because Conway wanted to assure that he would not inherit the collective bargaining agreement), and they derived the benefit of their bargain in having done so. In short, Zady Natey and Nathan Mash made a choice not to actualize their own hypothetical, and it is incumbent upon them to live with the consequences of their decision.

of the performance of section 13 -- was derived from its essence.

A separate order effecting the rulings made in this opinion is being entered.

Date: June 30, 1992

(signed)
J. Frederick Motz
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ZADY NATEY, INC.	*	
	*	
v.	*	Civil No. JFM-91-3242
	*	
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL NO. 27	*	

*****

ORDER

For the reasons stated in the opinion entered herein, it is this 30th day of June 1992

ORDERED

1. Plaintiff's motion for summary judgment and motion that the arbitrator's award be vacated are denied;

2. Defendant's motion for summary judgment and motion for enforcement of the arbitrator's award are granted; and

3. Judgment is entered in favor of defendant against plaintiff.

/s/
J. Frederick Motz
United States District
Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 29, 1993

No. 92-1895
CA-91-3242-JFM

ZADY NATEY, INCORPORATED

Plaintiff-Appellant

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION,
Local No. 27

Defendant-Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

1025.203

In the Matter of Arbitration between:	)	
ZADY NATEY, INC.	)	AAA Case No. 16 30 00188
and	)	88S
UNITED FOOD AND COMMERCIAL WORKERS LOCAL UNION NO. 27	)	Decision No. F-AAA-155
	)	Issued: July 13, 1989

APPEARANCES

On Behalf of the Company:

Warren M. Davison, Esq., Attorney
John W. Kyle, Esq., Attorney
Harry Adelberg, Esq., Witness
Nathan Mash, Witness

On Behalf of the Union:

Joel A. Smith, Esq., Attorney
Bruce Drasal, Business Representative
Leroy Phillips, Steward

Arbitrator:

Paul J. Fasser, Jr.

Decision No. F-AAA-155
AAA Case No. 16 30 00188 88S

THE GRIEVANCE

In this grievance the Union protests the Company's action when it sold its operations without prior notice and terminated the Collective Bargaining Agreement without taking into account the Successors and Assigns clause.

BACKGROUND

For many years, Nathan Mash[1], a Baltimore businessman, conducted a business engaged in the production of ham and pork products. The product was mechanized under various names, including that of Mash's

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[1] For purposes of this Opinion, the Company, Nathan Mash, Zady Natey, "old" Mash's, and the Seller are synonymously referred to as the previous owner of Mash's, Inc.

Hams. The enterprise operated under the title of Mash's, Inc., at sites in Baltimore and Landover, Maryland.

Early in 1987, a group of individuals headed by Terrance Conway[2] offered to purchase Mash's, Inc. The purchase was finalized through a complex arrangement whereby Conway, et al., formed two corporations - Landover Holdings, Inc., and Landover Acquisition, Inc. In March, 1987, these two corporations offered Nathan Mash a stock purchase agreement to cover the sale of Mash's ham and pork processing business which was located in Landover, Maryland. At the time of the sale, the employees of

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[2] Similarly, Conway, "new" Mash's, and the Buyer are used interchangeably to refer to the new owner of Mash's, Inc. With these denominations, it will be unnecessary to continually confound the reader with the effect of the Landover Holding and Landover Acquisitions maneuver which produced the Buyer.

Mash's, Inc., were represented by United Food and Commercial Workers Local 27. Their wages and conditions of employment were set out in a Collective Bargaining Agreement that expired December 31, 1987.

Nathan Mash learned through his attorneys that he would save approximately $2,000,000 in Federal income taxes if he were to sell his entire business through an Asset Purchase Agreement rather than a Stock Purchase Agreement. He then abandoned the Stock Purchase arrangement and sold the business via an Asset Purchase Agreement. During the negotiations for the sale, approximately twelve draft agreements were exchanged. During the negotiations, Nathan Mash insisted on indemnification for consequences of the sale in regard to his employees. Conway ultimately refused to continue the Labor Agreement and insisted

that this be a condition of the sale. Conway also insisted on secrecy and, consequently, the Union or individual employees were not told of the sale until after it had taken place.

On July 17, 1987, the sale was consummated. It represented approximately a $10,000,000 plus transaction. At approximately 4:45 on July 17, 1987, Mash's, Inc., ("old" Mash's) ceased to exist. The next day, Conway changed the name of his holdings and corporations to Mash's, Inc., ("new" Mash's) on the basis that he had purchased the name from Nathan Mash. Concurrently, on July 18, 1987, Nathan Mash formed a corporation titled Zady Natey, Inc.[3], whose assets consisted of the money

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[3] Zady, in Yiddish, is "grandfather" and Natey is Nathan Mash.

paid out by Conway to Nathan Mash for "old" Mash's, Inc., lock, stock, and barrel.

The entire business arrangement included approximately $7,120,000 in cash. In addition, Conway gave Nathan Mash ten, $100,000 subordinated convertible debentures in "new" Mash's. Nathan Mash was continued as a consultant for a $50,000 annual fee. In addition, through a complex leasing and sub-leasing arrangement, Nathan Mash was paid rentals for the property and some of the machinery and office equipment.

On July 17, 1987, "old" Mash's ceased to exist as an operating enterprise and "new" Mash's took over the operations. It should be noted that there was no notice to the Union of the impending sale. As a matter of fact, the evidence is that, as late as the day before the sale, on July 16, "old" Mash's Management had requested

that certain employees make concessions as to the thirty-six-hour guarantee[4] each work week in order to avoid layoffs.

There are five significant documents that were issued at approximately the time of the sale. At the risk of burdening the record, it seems prudent to set them out in their entirety. The first is a letter dated July 17, 1987, from "Old" Mash's Counsel to the President of UFCW Local Union 27. It reads as follows:

July 17, 1987

Mr. Thomas Russow, President

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[4] Section 2, F., reads as follows:

> F. All regular full-time employees shall be guaranteed a minimum of thirty-six (36) hours' work, or pay in lieu of work, per week, provided they have reported for work on Monday at the usual time, and have been available when needed from Monday through Friday, inclusive; . . .

16 30 00188 88S

United Food and Commercial
Workers Union, Local 27
6419 York Road
Baltimore, Maryland 21212

Dear Mr. Russow:

This is to inform you that Mash's, Inc., today finalized an agreement to sell its assets, including the Landover, Maryland, processing plant and equipment.

Therefore, effective immediately, Mash's, Inc., will cease operations and all employees within the collective bargaining unit represented by your labor organization will be permanently separated from employment. Concurrent with the issuance of this letter, notices of termination have been sent to the employees by Federal Express. A sample notification letter is attached for your information.

As labor counsel for Mash's, Inc., I am prepared to meet with you to negotiate matters related to the effects of the sale upon the employees you represent.

Sincerely,
/s/
WARREN M. DAVISON

The second letter is the hand-delivered letter from the Union directed to "old" Mash's and "old" Mash's Counsel:

July 21, 1987

HAND DELIVERED

Warren M. Davison, Esquire
Littler, Mendelson, Fastiff & Tichy
The World Trade Center
Suite 1653
Baltimore, MD 21202-3005

Mash's, Inc., also trading as
Mash's Hams, Inc.
5801 Columbia Park Road
Landover, Maryland 20784

Gentlemen:

You have informed us that Mash's has closed its operations effective immediately and that all employees within our bargaining unit are to be terminated. The reason for these actions is that the assets of Mash's have been sold. Your letter of July 17, 1987 states: "This is to inform you that Mash's, Inc., today finalized an agreement to sell its assets, including the Landover, Maryland Processing Plant and equipment."

Apparently you believe that Mash's has no obligation to see to it that terms and conditions that were promised to members of our bargaining unit will be preserved in the future. Section 13 of our collective bargaining agreement with Mash's states that the agreement is to be binding on the parties and on their successors and assigns. We interpret that section of the agreement as imposing an obligation on Mash's to see to it that any would-be purchaser of the business, no matter in what form, whether it be through a sale of stock or a sale of assets, recognize the collective bargaining agreement, agree to abide by it, and guarantee the performance of its terms through its expiration on December 31, 1987.

It is for these reasons that we believe that Mash's has violated Section 13 of the collective bargaining agreement. Our claim and interpretation of the contract are that the contemplated sale, as it has been revealed to us thus far, violates the contract. Indeed, we also believe that Mash's has violated the contract by laying off the work force, and therefore demand back pay and benefits dating from July 17, 1987.

You are to treat this letter as a grievance filed under Section 11 of the collective bargaining agreement. In view of your actions to date and your failure to advise Local 27 in advance of the layoff, we seriously doubt that any interim steps in the grievance process will be helpful. We are prepared, instead, to proceed to arbitration as expeditiously as possible. We request that you agree with us that all preliminary steps, particularly those steps outlined in Section 11, paragraphs A.1, 2 and 3 be bypassed. We wish to proceed to arbitration directly and immediately according to the voluntary labor arbitration rules established by the American Arbitration Association.

Very truly yours,
/s/
Al Snell
Executive Vice President
For
Thomas Russow
President

Also on July 17, Nathan Mash sent the following notice by Federal Express to all employees:

16 30 00188 88S

July 17, 1987

TO ALL EMPLOYEES OF MASH'S, INC.:

This is to inform you that the assets of Mash's, Inc. have been sold, and Mash's, Inc. has closed its operations effective immediately. Therefore, your employment with Mash's, Inc. has been terminated this date.

We are simultaneously notifying the unions which represent certain of the employees and we plan to meet with representatives of the unions to negotiate the effects of the sale upon the employees covered by collective bargaining agreements.

Final paychecks for all work to date will be made available at the Howard Johnson's Motor Lodge located on the Baltimore-Washington Parkway at Maryland Route 202, Cheverly, Maryland, on Friday, July 24, 1987, between the hours of 10:00 a.m. and 2:00 p.m. in Room 253 (first floor).

Sincerely,
MASH'S INC.
By: /s/
Nathan Mash, President

Simultaneously, on the same day, Conway, the President of "new" Mash's Inc., sent the following notice to all employees:

July 17, 1987

Dear Former MASH'S Inc. Employee:

I have recently purchased MASH'S Inc. from its former owner Nathan Mash. I intend to re-open this facility at a later date under new terms and conditions of employment. We are assembling the best possible workforce to ensure a bright and profitable future for our new company.

If you are quality-oriented and would like to be considered for employment, I encourage you to make application at the Days Inn - Capitol Center, 55 Hampton Park Boulevard, Capitol Heights, Maryland beginning Monday, July 20, 1987 between 9:00 AM and 3:00 PM.

Sincerely,
/s/
Terry N. Conway
President, MASH'S Inc.[5]

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[5] It should be noted that July 17, 1987 fell on a Friday.

There is nothing in evidence to show how many former Mash employees appeared for the interview on Monday, July 20, but there is evidence that, of the 138 eligible employees on the payroll as of July 17, thirty-nine were given jobs with Conway's company. It is undisputed that wage rates under conway were substantially lower than wage rates under Nathan Mash.

The Seller's action spawned a considerable amount of litigation. Significant here is that litigation concerned with arbitrability.[6] There, the United States District Court for the District of Maryland found the following:

> 1. The motion of plaintiff, Local 27, to compel arbitration on the part of Zady

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[6] Civil No. PN-87-1956, United Food and Commercial Workers International Union, Local 27 v. Zady Natey, Inc., et al.

> Natey, Inc. is GRANTED, and Zady Natey, Inc. is hereby ordered to proceed with arbitration in accordance with the Collective Bargaining Agreement with plaintiff with respect to the interpretation and application of paragraph 13 of that agreement.

The Parties rely on the following provisions of the March 7, 1983, Agreement which are set out in pertinent part as follows:

> SECTION 1 - RECOGNITION AND UNION SECURITY
>
> . . .
>
> B. The Company has the direction of the working force, including the right to hire, suspend or discharge for proper cause, or transfer; the right to establish production schedules and the right to relieve employees from duty because of lack of work or other legitimate reason, subject only to such limitations as are provided in this Agreement . . . .
>
> SECTION 11 - GRIEVANCE PROCEDURE AND

ARBITRATION

Should any difference arise between the Union or employees and the Company as to the application and interpretation of this Agreement, there shall be no strike, stoppage or suspension of work on the part of the Union or the employees, or lockout on the part of the Company, on account of such conditions. The following procedure shall be followed in settling such differences:

A. Complaints or grievances presented by the Union and/or employees.

. . .

4. Any complaint or grievance not satisfactorily settled by Step 3 above, shall upon application of either the Company or the Union, be referred to an Impartial Arbitrator to be selected by the mutual agreement of both parties. If the parties shall fail, within ten (10) days after notice from the party asking for arbitration, to agree upon an impartial arbitrator, such arbitrator shall be selected from a panel supplied by the American Arbitration Association un-

der the rules of said Association. The decision of the Impartial Arbitrator so selected or appointed shall be final and conclusive upon the Company, the Union and the employees. The arbitrator shall have no authority to add to, change or subtract from the terms and provisions of this Agreement.

SECTION 13 - SUCCESSORS AND ASSIGNS

A. This Agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns.

SECTION 24 - DURATION OF AGREEMENT

A. This Agreement shall become effective March 7, 1983 and shall remain in full force and effect through Dec. 31, 1987.

CONTENTIONS

The Union argues that Mash's, Inc., continues to operate as it did prior to the sale. It says that it produces the same pork and ham products and uses the same

machinery, advertisements, logo, and product names. It says that the Union's grievance is that Zady Natey, Inc., was involved in a sale which terminated all work for its Bargaining Unit employees and failed to continue the existing Labor Agreement. The Union cites Howard Johnson v. Detroit Local Joint Executive Board, 417 US. 249, 257 (1974), where it says the Supreme Court recognized a Union's need to "have a realistic remedy to enforce their contractual obligations".

The Union says that the Seller claims that Article 13 of the Collective Bargaining Agreement, which is the Successor and Assigns clause, has no meaning. Here, says the Union, the Seller is wrong. Zady Natey had obligated itself to provide work, wages and benefits of employment to its employees until the Contract terminated, or as long

as there was ham or pork processing in either of the two Plants it owned. It says that when the new owner, Conway, wrote to the former employees that he intended to operate the facility at a later date, he accepted job applications from new and old employees but failed to hire many Union employees. Indeed, says the Union, management employees of the Seller were hired in a group as management employees of the Buyer. Furthermore, says the Union, most Bargaining Unit employees of the Seller earned $9.40 an hour while the Buyer intended to pay $5.50 an hour.

The Union argues that the bargaining Agreement between Local 27 and the Seller did not expire when the business and its assets were sold because that Agreement contains the Successors and Assigns provision set out in Section 13 of the Agree-

ment. Significant here, says the Union, is that while the various drafts of the Asset Purchase Agreement were being revised, it was clear in those drafts that the Buyers would assume the existing Labor Agreement. In fact, it says, the obligation was written into the Assets Purchase Agreement. However, it says, in late June, 1987, the Buyers changed their position and informed the Seller that they would not accept the Labor Agreement. It says that the Buyer insisted that the Seller discharge his work force and close the Plant as a condition of sale. The Union argues that the Seller clearly understood his risk under Section 13 of the Agreement and, during the negotiations of the sale, his Attorney sought to shift the financial risk to the Buyer by asking for an indemnity from the Buyers.

Here, the Union quotes the Seller's Attorney on the matter:

> On behalf of the seller I requested that the seller be indemnified from any loss or expense including the loss of litigation which might flow if there were any dispute over this, and any other damages or expenses. It was always possible we would sign a contract on one day, there could be a labor dispute and never close. So I wanted broad indemnification for my client.

The Union says that it is clear that Nathan Mash actively sought and insisted on indemnity from the Buyer in the event that he, as Seller, was later found to have incurred a liability based on his responsibilities under the Collective Bargaining Agreement.

The Union cites three provisions of the final Asset Purchase Agreement which it believes to be pertinent:

> The Purchase Price shall not be subject to adjustment as the result of any loss or expense incurred due to work stoppage, slow down or other similar job action which occurs after the date hereof, whether such loss or expense is due to loss of profits or expenses incurred in connection with such labor matters.
>
> Seller shall have shut down its Landover plant and terminated the employment of all the employees of the Business. Seller shall dispatch from the Closing a letter to all employees and a letter by Federal Express to the unions referred to in Schedule 3.24, informing them of the shutting down of the Landover plant and the termination of the employment of Seller's employees.
>
> Notwithstanding any provision in this Agreement to the contrary, Buyer's and Holding obligation to close hereunder shall not be affected in any way by work stoppage, slowdown, or other similar job action which occurs after the signing of this Agreement.

The Union says that the business activities of the Buyer are the same as

those of the Seller. The same formula fluids are injected into the meats and Conway produces Mash's hams exactly as they had been produced prior to the sale on July 17, 1987.

Furthermore, says the Union, Nathan Mash continued to participate in the business. It says that he received approximately $7.2 million in cash and continues to receive monthly lease and royalty payments from the business in substantial amounts. In addition, it says, he received ten, $100,000 subordinate convertible debentures which include anti-dilution language. The Union says in regard to Zady Natey, which is the repository for the money received by Nathan Mash from the Buyer, that it has no employees nor is it engaged in an active business.

The Union says that Section 13 of the Collective Bargaining Agreement was proposed by the Union and written into the Contract in the early '70's. It says that there is no question that the Buyer and his Attorney clearly understood what the language meant. However, says the Union, they viewed the language as innocuous because it would only come into play when Nathan Mash died.

The Union argues that Section 13 is a bona fide Successor and Assigns clause. It says that the purpose of the clause was to protect Mash's employees should the Company be sold or transferred. It says that this plain language, along with the clear language of the duration clause, sets out the Parties' intent that the Agreement survive a change in ownership. The Union says that the Company's argument that the Union

believed that the Seller was prohibited from closing his Plant is in error. It says that the Union's argument is not that Nathan Mash was prohibited from closing his Plant but that he was responsible for seeing that the new owner would abide by the 1983-87 Collective Bargaining Agreement. Granting that Nathan Mash had the right to sell his Plant, the Union says that when he sold it without requiring the Buyer to assume the Collective Bargaining Agreement, he was at risk.

The Union cites an Arbitration Decision in Marley-Wylain Company[7]. There, it says that the fact situation is almost identical to that found in the case at hand. It says that the Arbitrator in that case found the Successors and Assigns

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[7] Marley-Wylain Co., Barry Blower Co. Civ., 88 L.A. 978 (Jacobowski, 1987)

clause not to be inconsequential as the Company claims when he said:

> That argument is an overly presumptive speculation, in the fact of much evidence to the contrary. Prominent texts on the subject recognized that the intent and purpose of successor language is to have the contract continue and be binding on a successor and that the reference to a successor in a contract is meaningful. See West's 40 A.W. & p, 20 et seq. B & A's CBNC 70:181 and CCH's contract clauses 51, 803.

The Union cites a number of Supreme Court Decisions, including Howard Johnson and Burns International Security. It says Burne clearly holds that where there is a successor to the operation, the signatory to the Collective Bargaining Agreement is obliged to respect any Successors and Assigns provision. It says that there is no case in the arbitral array that holds

that a Successor and Assigns clause is meaningless or that it is not binding.

The Union also cites, among others, the Herbert J. Caplan, Inc. Decision[8] of Arbitrator Levine in a 1983 Decision. It points out that Arbitrator Levine stated:

> In the case at bar, not only did Caplan Buick fail to require Baron to assume the collective bargaining agreement, but Caplan expressly agreed that Baron would not be bound by the collective bargaining agreement. That was part of the deal.
>
> Clearly, a business cannot avoid an obligation it has incurred by agreeing that a purchaser of the business will not assume the obligation. For example, had Caplan purchased equipment for the business, it could not avoid payment for the equipment based upon an agreement with a new owner of the business that the new owner would not be liable for payment or the equipment. Here, Caplan had an obligation it had

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[8] Herbert J. Caplan, Inc., 81 L.A. 22 (Levine, 1983)

> incurred to live up to the terms of the collective bargaining agreement. The fact that Caplan agreed with Baron that Baron would not be bound by the collective bargaining agreement does not absolve Caplan of liability under the collective bargaining agreement.
>
> I find that Section XXVI, Assignment of Contract, requires that where, as in the case at bar, an employer enters into an assignment, by a sale of assets, transfer, change of ownership or any other means, it has an obligation to require the assign to assume and be bound by the collective bargaining agreement for the remainder of the term of the collective bargaining agreement. Where, as here, an employer assigns its business or shop without insuring that the assign be bound by the collective bargaining agreement, the original employer remains liable to the Union and its members for losses they may suffer as a result.

The Union says that the Company's argument that the Buyer is not a successor is not well-grounded. Once more, it cites Arbitrator Levine on this issue:

> As noted by the Union, an assignment is a general term covering any transfer of property, whether real or personal property (here it was both), gratuitously or for money (here, it was a combination). An assign (or "assignee") is simply a person to whom a transfer of property, rights or interest is made. The very "assign" simply means, in law, "to transfer." Assignment "includes transfers of all kinds of property," as Black's Law Dictionary states.
>
> . . . It matters very little whether the transfer is effected by a bulk sale of assets, a change of name, sale of stock, or any combination of methods.

The Union argues that Nathan Mash should be responsible for any loss to employees as a result of his action when he sold the business to Conway without requiring that Conway assume the current Labor Agreement. The Union says that Mash has a responsibility here not only because of the plain language of Sections 13 and 14 of the

Labor Agreement but also because of the past relationship between Mash and his employees where he continually promised that, if they gave wage and benefit concessions, their jobs would be secure as long as hams were being produced. The Union cites a number of special agreements signed by Nathan Mash which make such promises and representations. The Union acknowledges that there were two wildcat strikes during the term of the Agreement, each lasting one day. Nevertheless, it says, the employees gave considerable concessions. These concessions, says the Union, were made on the basis of Nathan Mash's promise that the Agreement would remain in effect through December 31, 1987.

Here, the Union cites a Whittaker Corporation Arbitration[9] where the Arbitrator found that, in similar circumstances, "the assurances quoted above must therefore be found to be enforceable and binding." It says that there are other cases which support this contention.[10] The Union says that the employees trusted Nathan Mash and relied on his representations which were actually to their detriment because they accepted wage and benefit cuts. The Union urges that Nathan Mash not be permitted to renounce his promises to these employees in regard to the Successors and Assigns clause.

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[9] Whittaker Corporation, Columbus Milpar Division. 70-1 ARB ¶8384 (1970).

[10] International Harvester Co., 17 L.A. 101 (McCoy, 1951).

The Company says that the Union does not understand the real issue in this case. It says that the Union characterizes the issue as the effect of the sale on the Parties' Collective Bargaining Agreement. The Company says that this is incorrect and that the proper issue is whether Zady Natey, having the right to sell its assets, was required by the Labor Agreement to first secure the commitment of the purchaser to recognize the Union and abide by the terms of the Labor Agreement. The Company says that most of the Union's argument is irrelevant because it deals with the Union's claim of the Company's historical mistreatment of its employees. The Company says that it took no pleasure in terminating its employees on July 17, 1987, yet the Company was exercising its right to sell

its assets and that such right was no way limited or impaired by the Labor Contract.

The Company admonishes the Arbitrator not to be sympathetically influenced by the plight of a worker who suddenly finds himself unemployed. It says that it is not within the Arbitrator's jurisdiction to reorder the existing rights of the employees. It says, also, that much of the Union's argument is based on the hopes and expectations of the employees that Zady Natey would continue in business and that their jobs would be secure based on representations made through the course of the bargaining history. The Company says that if the Union were to be entitled to what it now seeks, it should have negotiated such language in the Agreement.

The Company argues that the concept of successorship should be viewed in the

context of a corporate sale of assets. It says that the terms of a Contract should be interpreted in their commonly understood sense. Consequently, says the Company, where Contract terms have readily understood meanings, the Parties' Agreement should be viewed against those recognized meanings. It says that the core of the matter at issue here is the Company's contention that the language of Section 13 of the Labor Agreement has no application in circumstances where the purchaser is not a successor in that the Labor Agreement did not impose upon Nathan Mash the obligation to obtain an agreement from the Buyer that he would be bound by the terms of the Labor Agreement. Therefore, says the Company, the sale of assets without obtaining an agreement from the Buyer that he would continue the Agreement, did not breach the

terms of the Agreement with Local 27 because there is no specific language which says that such agreement must be obtained from the Buyer. Therefore, concludes the Company, there is nothing here to be remedied by the Arbitrator.

The Company says that the kind of transaction, whether it was a stock purchase, sale, or an Asset Purchase Agreement, did not matter except as to the income tax advantages of the Asset Purchase Agreement. The Company says that the Buyers told the Seller that they would not assume the Labor Contract. In addition, the Buyers conditioned the sale on a commitment from the Seller that he would terminate the employees at the time of closing. The Company said that "old" Mash's attempted to secure assurances in the form of an indemnification for expenses

flowing from disputes or litigation arising out of the sale. It says that when the Buyers were unwilling to agree to this indemnification, the Seller dropped the proposal and continued with his right to sell his facility.

The Company says that, at the time of the closing, Labor Counsel for "old" Mash's was authorized to notify the Unions. This was forthcoming and the Company says, therefore, Local 27 received notification of closing. The Company says that following the sale of assets, Zady Natey had no further connection with the Landover facility and is not in the business of marketing or distributing ham or pork products. The Company acknowledges that Nathan Mash, individually, entered into an Agreement with the Buyer for consultation services

and that he was given subordinated convertible debentures guaranteed by "new" Mash's.

The Company says that the Union makes a considerable argument concerning the applicability of Section 13, the Successors and Assigns clause. As a reminder, that clause reads as follows:

> This Agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns.

The Company says that this provision was put into the Contract in the early '70's and that it was not discussed in the negotiations subsequent to that time. The Company says that it is significant that the Union did not propose to change the language of the clause.

The Company sees the Union's position in this grievance as being that the Succes-

sors and Assigns clause clearly provided guaranteed employment to the employees if not by "old" Mash's then by whomever succeeded it. The Company says that much of the testimony in this arbitration was irrelevant. It says that the only issue is whether the Successors and Assigns clause specifically obligated "old" Mash's to require that a Buyer of its assets adopt the "old" Mash's Labor Agreement. The Company asks the Arbitrator to credit the testimony of former Company Counsel Adelberg and Nathan Mash that there was no discussion of any kind concerning the Successors and Assigns clause at the time the Parties negotiated the most recent Collective Bargaining Agreement.

The Company, in its testimony and brief, elaborately traced the history of negotiations at the Company involving both

the Dukeland Street facility in Baltimore and the Landover, Maryland, facility. It portrays Nathan Mash as a benevolent employer beset by cyclical business adversities who was interested in continuing in business to provide jobs for his employees as long as his business was profitable. The Company also characterizes the Union and its employees as ungrateful workers who extorted wage increases and commitments from the Company by virtue of two, 1-day wildcat strikes over the bargaining history.

The Company argues that the Successors and Assigns clause does not set forth an affirmative obligation of the Company concerning its heirs, executors, administrators, successors and assigns. It says that the clause simply stats that the Agreement shall be binding upon such per-

sons or entities. The Company acknowledges that former Counsel Adelberg told the Union that, in the early '70's, he and Nathan Mash knew of the meaning of the Successors and Assigns clause in the Contract but that they were unconcerned because there was then no contemplation of a change in the ownership of the business. The Company says that even though the Successors and Assigns clause is in the Agreement, there is nothing to show the Parties' intent when they negotiated the language in their early Labor Agreement.

The Company says that the language of the Successors and Assigns clause purports to bind a successor or assign to the terms of the Agreement. However, the Company says that it understands the word "assigns" in the Successors and Assigns clause to mean the assignment of the Labor Agreement

and not as a designated entity who receives the assets of the corporation. In any event, the Company says that this arbitration does not concern the obligations of a successor or assign. It says, rather, that it concerns the obligation of the signatory employer, Nathan Mash. The Company says that it does not believe that the matter is arbitrable. It says that "new" Mash's is not a successor and that the court erred when it ordered arbitration in this case.

The Company says that the Union improperly seeks relief from Nathan Mash. It says that a Successors and Assigns clause purports to place obligations only the Buyer. The Company says that the Union never told the Company that it believed that "old" Mash's had the specific obligation which the Union now contends. The Company says that the Union's argument that

the Duration clause of the Contract is any way related to the substantive issue in this case is frivolous. It says that the Termination clause does not commit the Company to remain in business or to guarantee employment for that period. The Company says that it has the right to relieve employees from duty because lack of work or other legitimate reasons subject only to "such limitations as provided in this Agreement." The Company, here, is citing the Management clause, Section 1(b) of the Labor Agreement.

The Company argues that because Nathan Mash had this right to relieve employees from duty for a legitimate reason, he has no obligation to or liability for "old" Mash, Inc., employees after July 17.

The Company says that Federal law and arbitrable precedent show that a Successors

and Assigns clause does not impose upon the Seller the obligation to condition the sale of his assets upon the Buyer's consent to be covered by the Labor Agreement. The Company cites Wyatt Manufacturing Co., Inc., 82 L.A. 153 (Goodman, 1983) and Arbitrator Goodman's emphasis on concern for the Buyer in the following excerpt from Goodman's Decision:

> Yet, and here is the point of departure, when we speak of predecessor liability, we are not just speaking about the obligations or responsibilities of the selling company vis-a-vis its employees and the union -- i.e., a normal contract interpretation case -- but equally important, the selling company's duties and responsibilities vis-a-vis the buyer. And with regard to that relationship, the seller should not be made to account for the decisions of the buyer unless the agreement identifies that responsibility in no uncertain terms. Stated differently, as shown by those arbitration cases where liability of the seller was found

> to exist, there is a significant difference between a seller who agrees that the contract shall be binding upon its successors and assigns and the seller who (a) agrees to continued liability if the buyer does not assume the agreement or, (b) obligates itself to find a buyer who will assume the agreement as a condition of sale, or (c) covenants to refrain from performing any act which evades or avoids the terms of the agreement.

The Company contends that it is not saying that the Successors and Assigns clause has absolutely no meaning. It merely says that it is the successor, and not the Seller, that the clause binds to the terms of the Collective Bargaining Agreement. This, it says, is the plain meaning of the language. The Company says that the Union is misdirected here and that it should be pursuing the purported successor and not the Seller in order to enforce the Labor Agreement. In this regard, the

Company cites Gallivan's, Inc., 79 L.A. 253 (Gallagher, 1982). The Company argues that the Buyer was not a successor. It reasons that when the Buyer refused to consummate the sale if it were required to continue the Labor Agreement, it had exercised its right not to be a successor and, therefore, the Successors and Assigns clause cannot be an obligation of the Seller because the Buyer was not a successor.

The Company says that Nathan Mash's attempts to achieve an indemnification for consequences of the sale in regard to the Labor Agreement were based on nothing more than prudent business judgment and common sense so that he would be protected against post sale labor disputes. The Company says that the reality of this possibility is demonstrated by the Union's aggressive, though ill-founded, post-sale attempt to

obtain relief against Nathan Mash through this current arbitration. It says that Nathan Mash's attempts to protect himself against post-sale liabilities to his employees have nothing to do with the Union's claim under Section 13.

The Company says that one of the reasons that there is no successor here is that the Supreme Court, in Fall River dyeing & Finishing Corporation v. NLRB, ____ U.S. ____, 107 S. Ct. 2225 (1987) found that a successor is a Buyer whose employee complement is composed of a majority of the predecessor's employees and who has continued in the same business as the Seller at the same location. Therefore, says the Company, since this condition was not met in the sale at hand, there is no successor and the Union errs when it at-

tempts to seek relief under the Successors and Assigns clause.

The Company cites a number of Arbitration Decisions and supreme Court Decisions, including Howard Johnson. It concludes that the principles of Federal Labor law preempt contractual obligations and that Federal Labor Law holds that a successor is one who continues to operate the enterprise in the same manner as the predecessor and who hires a majority of its employees from the predecessor's work force. It says that the Arbitrator has no authority to substitute some other definition of the term "successor" and therefore cannot interpret the meaning of a Successors and Assigns clause because the Labor Agreement provides that the Arbitrator shall have no authority to "add to, change, or subtract from the terms and provisions of this Agreement."

The Company says that the Union is improperly contending that "old" Mash's could not sell its assets to "new" Mash's unless "new" Mash's adopted the Labor Agreement. The Company says that the Arbitrator has no authority to compel "old" Mash's to sell its assets only to a purchaser who agrees to assume "old" Mash's Labor Agreement. It says that the Successors and Assigns clause simply does not state that such conditions will be put upon any Buyer of the Company. The Company disputes the Union's reliance on Marley-Wylain Company, Barry Blower Div., 88 L.A. 978 (Jacobowski, 1987) on the basis of a different fact situation. It says that, here, there is dissimilar language, no bargaining history or practice in support of the Union's position, no prior adherence to the Successors and Assigns clause, and

no immediate assumption of the operation by the Buyer. The Company says, also, that the Union's reliance on Herbert J. Caplan, Inc., 81 L.A.22 (Levine, 1983) is unsound. It says that Arbitrator Levine erred in his Decision and, therefore, the Decision cannot be relied upon for guidance in this case.

The Company says that the Union relies on parol evidence in regard to promises made by Nathan Mash that he would keep the operation going as long as it was economically feasible. It says that under no circumstances did any promises include the condition that he would not sell the property.

Finally, the Company says that the Union's thrust is misplaced. It should not be directed at Nathan Mash but at the owners of "new" Mash's who are the individ-

uals who have not continued the Collective Bargaining Agreement and, therefore, it is that errant employer from whom the Union must seek relief.

FINDINGS

As indicated in the Background, the Parties have engaged in considerable litigation prior to and during the period of this Arbitration. The evidence submitted by the Parties in support of their positions in this grievance is considerable. The Parties rely on testimony concerning negotiations between the Union and Nathan Mash and depositions concerning events surrounding the purchase of the "old" Mash's by Terrance Conway. In addition, each Party relies on a considerable number of Court and Arbitrator Decisions concerning the application of various Successors

and Assigns clauses. Except for some comment on various Court and Arbitrator Decisions, this Arbitrator does not feel that an exhaustive attempt to set out or distinguish every citation used by the Parties is necessary.

The Parties were unable to stipulate a precise issue and their differences in approach to the issue contributes heavily to their need to support their respective positions by voluminous evidence. The Company sees the issue as being one where the Union believes that the Successors and Assigns clause in the Labor Agreement prohibited Nathan Mash from selling his company unless he found a Buyer who was willing to continue Nathan mash's employees in employment and continue the Labor Agreement that was in effect at the time of the sale.

The Union sees the issue as Nathan Mash's being bound to the Successors and Assigns clause in the 1983 Agreement which he signed. The Union does not contend that he was prohibited from selling to a Buyer who was unwilling to assume the employees and the Labor Agreement. However it does contend that he was responsible for the continuation of the labor Agreement and the employment of those employees on the pay-roll as of July 17, 1987, whatever form that took.

Certainly, the Successors and Assigns clause does not state that Nathan Mash was required to find a Buyer who was willing to continue the employees and the Agreement. It says simply:

> This Agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns.

The Company's view of the issue comes then from outside the Labor Agreement. Here, the Company discusses several Supreme Court and Arbitration Decisions where the language of the Successors and Assigns clause was couched differently or combined with other provisions of the Contract. But, in any event, the Company chose those cases where the Court or the Arbitrator found that the language in those Agreements was insufficient to bind a successor or an assign. The Company asserts that the term "assign" in this Agreement as set out above somehow means assignment of the Labor Agreement and not assigns of the Parties. This Arbitrator believes that the Company's definition of "assigns" is blatantly erroneous and is rejected out of hand.

In regard to the definition of "successor," the Company says there was no

successor here because Mash's had closed the Plant and the employees were terminated. It says that "new" Mash's opened up the business on its own with different employees and here the Company believes that the Supreme Court has decided that a successor is a company that has employed a majority of the former employees nd has continued those employees in the same work place in the same business.

Whatever the facts were in Fall River Dyeing[11] that required such an elaborate bill of particulars, they are not in this case. On July 17, 1987, Nathan Mash, after his employees had left the Plant and, without their knowledge, terminated them. Even though it was not until the eleventh

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[11] Fall River Dyeing & Finishing Corp. v. NLRB ___ U.S. ___, 107 S. Ct. 2225 (1987)

hour that Nathan Mash agreed to terminate his employees after they left work on July 17, 1987, he did, in fact, agree to terminate them as a condition of sale.

Simultaneously, using the same letterhead and logo, Conway announced to Nathan Mash's employees that they could apply for jobs in the Plant producing the identical product with the identical equipment using the identical Company name under Conway's ownership. The letters were sent out on that Friday and employees were invited to apply between certain hours on the following Monday. Of course, any employee who did not receive the letter from Conway would not know to apply on Monday. Furthermore, Conway intended to run the operation with employees who were willing to work at approximately half of what Nathan Mash paid his employees. It is obvious

from these facts that the cases using the retention of a majority of the prior owner's employees as the criterion to determine successorship is not applicable here. Using that standard, a Buyer and Seller could effectively defeat any Successors and Assigns clause by making work at the continued operation under the new ownership unpalatable or unavailable to the former employees and, therefore, discourage their reemployment. Here, Conway hired selectively and offered little more than half of the old wage rate. He controlled the number of "old" Mash's employees that would continue with the operation and effectively determined that the majority of "old" Mash's employees would not be employed in the continuing operation.

Whether Conway, the Buyer, was an assign is of no consequence because there

is no escaping the fact that he is the successor. It should be noted that the Company relied heavily on a Decision by Arbitrator Goodman in Wyatt here. Some discussion of the applicability of the guidelines in that case is necessary. Goodman was faced with a situation where an individual sold himself part of one of his divisions and, while he had language in the Labor Agreement which could reasonably be considered to be a Successors and Assigns clause, he apparently could not persuade himself to continue the Labor Contract.[12] Goodman thoroughly reviewed all outstanding

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[12] It should be noted that, in Wyatt, the Union was not notified of the sale in spite of the fact that the Agreement specifically provided for such notice. Goodman approved on the basis that there were sound business reasons for such action. In the case at hand, Nathan Mash engaged in secret sale negotiations specifically to keep the Union from discovering that the transaction was taking place.

Federal and Arbitral Law in that case. Having at issue Contract language that seemed to have the essential elements of a Successors and Assigns clause, he decided that the language was meaningless unless it included an additional codicil specifically stating that the employer must require the Buyer to assume the Labor Agreement. On that basis, he denied the grievance and found that the Seller who was also the Buyer was not obliged to continue the Agreement. Goodman accepted the notion that the Successors and Assigns language included an implied requirement that the Seller sell only to a Buyer who was willing to accept the employees and the Contract. He also decided that because the Successors and Assigns language was first negotiated in 1955, it was stale and did not have modern application. For those and other

reasons, Wyatt is not useful for purposes of the case at hand.

The Union cites, as certainly can be expected, those Supreme Court Decisions, particularly Howard Johnson, and Arbitrator Decisions which support its view. It particularly relies on a Decision by Arbitrator Levine in Caplan where Levine explicitly decided that the Seller, having a Successors and Assigns clause in his Labor Agreement, had a responsibility to the employees even though he did not require the Buyer to continue the employees in employment and the Labor Agreement in effect. In the situation at hand, Nathan Mash recognized his obligation to his employees in the Contract during the Asset Purchase Agreement negotiations. Until the eleventh hour on July 17, 1987, he held out for an indemnification of his responsibili-

ty to his employees. The Buyer, having initially considered continuing the employees and the Labor Agreement, apparently changed his position and demanded that Nathan Mash terminate his employees at the point of sale. This language was inserted into the final Asset Purchase Agreement which mash and Conway signed. Mash knew of his obligation. He knew that he could possibly be held to a liability to his employees in regard to the sale of the business. At the point that he decided to sell, the decision to assume that liability without indemnification from Conway was his.

The Successors and Assigns clause in the Contract is clear and unambiguous. It does not require convoluted definitions of the terms. Conway was a successor to Nathan mash. There is no need for redun-

dant language which would state that the Seller would sell only to a Buyer who would assume the Contract nor is there any sense to the proposition that no matter the working conditions offered by the Buyer in this case, the Seller is not liable under the clause if the Buyer does not employ a majority of the former employees.

The Company urges that it is the Buyer that is liable here and not the Seller. This Arbitrator is not charged with determining the Buyer liability. The issue here is whether Nathan Mash was at risk and assumed the obligation under the Successors and Assigns clause when he knowingly sold to a Buyer who would not purchase the business from him unless he agreed to terminate the employees at the point of sale. Contrary to the finding in Wyatt, this Arbitrator believes that the Parties

do not write meaningless language. The Company's argument that the language has some other meaning than that which was initially intended when the clause was first negotiated is without merit. The language of Section 13 means precisely what it meant in the early '70's. The evidence is that when the Successors and Assigns clause was put into the Labor Agreement in the early '70's, Company Counsel and Nathan Mash felt that it was an innocuous clause because Nathan Mash did not intend to sell his Plant or to die and, therefore, the clause would not be operative.

Certainly, the protective Labor Agreement language such as that in Successors and Assigns clauses are not welcomed by employers. However, they are negotiable matters and are a benefit to the Union. Usually a Union concession is made in order

to achieve the language. There is no evidence here as to what may have been conceded, if anything, by the Union in order to gain this clause. But, nevertheless, it is a plus and all pluses in negotiations have some tradeoffs. However, whatever the facts were surrounding the negotiations of that language, it became a part of the Agreement.

The fact that the Union did not discuss Section 13 during succeeding negotiations is not surprising and certainly does not detract from its efficacy or validity. Why should the Union seek to disturb a clause which it considers to be beneficial and which it and the Company believe to be operative on a continuing basis? What could the Union do to improve the plain language of this clause? To accept the Company's argument that Section 13 has no

force and effect on the Seller would be tantamount to stating that when Nathan Mash signed the 1983 Agreement, he did not intend to provide the protections of Section 13 even though it was plainly written in that Agreement. It is rockbound Arbitral Law that the Parties do not write meaningless language in their Collective Bargaining Agreements. Whatever is there has intend and meaning and shall be so construed here.

The plain hard fact is that, Nathan Mash, during the negotiations for the purchase of his business by Conway, attempted to indemnify himself against liability arising out of his obligations to his employees under the Labor Contract. When he could not persuade the Buyers to indemnify him, he nevertheless proceeded to conclude the sale of his company. However,

the liability against which he sought to be protected did not disappear. The liability continued as set out in the Labor Agreement which he had signed. However, when he sold the Company, knowing that the employees would not be continued (and they did not know this until after the sale) he made the sale without the indemnification and took on the risk of being required to live up to his obligation under Section 13. In effect, failing to gain the indemnification from Conway, he gambled that somehow this failure could be construed as a basis on which to thwart the purpose and intent of the Successors and Assigns clause.

It is noted that the sale was kept secret from the Union until it was a fait accompli. The Union had no opportunity to excise its right to seek a temporary restraining order in order to enforce Section

13 nor did it have the opportunity to discuss the transition with Nathan Mash and Conway. Certainly, this element alone goes far to set this fact situation apart from others cited by the Company for support of its position.[13]

There is no escaping the fact that Nathan Mash signed the Successors and Assigns clause which guaranteed that the terms and conditions of the 1983 Agreement would have continued until December 31,

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[13] In this regard, note is taken of the following language of the Preamble to the Labor Agreement:

> WITNESSETH: That for the purpose of mutual understanding and in order that a harmonious relationship may exist between the Company and the Union to the end that continuous and efficient service will be rendered to and by both parties for the benefit of both, it is hereby agreed that: (The body of the Agreement, including Section 13, follows.)

A-109.

1987. He was responsible for continuing the terms of that Agreement through December 31, 1987, whether the hams were processed under his ownership or that of his successor. It must, therefore, be found that Nathan Mash (Zady Natey) is responsible for the application of the 1983 Agreement to those employees who had seniority with the Company before they were terminated on July 17, 1987.[14] His responsibility continues to the termination of the Labor Agreement which is December 31, 1987. Therefore, Nathan Mash is liable to continue, until December 31, 1987, the bene-

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[14] It is somewhat ironic that even though the Labor Agreement was negotiated to be effective in 1983, it was not signed until 1985. The reason for the delay was that the Union believed that it had negotiated a September, 1987 termination date and the Company insisted that it has negotiated a December 31, 1987 termination date. The Company prevailed.

fits and terms of the Labor Agreement which was in effect immediately prior to the point of sale on July 17, 1987.

1016.203.tk

Paul J. Fasser, Jr.
P. O. Box 909
Vienna, Virginia 22183
Arbitrator **Office: (703)938-0390**
Residence: (703)938-0848

October 28, 1991

John W. Kyle, Esq.
Littler, Mendelson, Fastiff & Tichy
Suite 1653, World Trade Center
401 E. Pratt Street
Baltimore, MD 21202

Joel A. Smith, Esq.
Abato, Rubenstein & Abato
2360 W. Joppa Road
Suite 308
Lutherville, MD 21093

RE: AAA Case No. 16 30 00188 88S
Zady Natey, Inc. and
United Food and Commercial
Workers, Local 27

Gentlemen:

I have carefully reviewed the numerous documents, letters, exhibits, and forms supplied to me by the Parties in regard to my holding jurisdiction in the above-referenced matter. I believe that, at this point in time, I have sufficient argument

and information from the Parties to decide the outstanding legal issues and, in addition, to provide the Parties with clear guidelines to reach a proper settlement in regard to making the affected employees whole.

It seems proper to deal first with the legal issues, then with an appropriate back pay formula and, finally, an application of that formula to the situations of the employees who are properly in the grievance. Essentially, then, the determinations to be made are who is to be paid and in what amount.

Computation of Back Pay: Each of the Parties has proposed a formula for back pay. The Union proposes to use a formula which yields a greater amount of earnings than would be calculated if a simple pro-

jection of 1987 earnings prior to the sale were used. Furthermore, the Union uses gross earnings as the base. The formula advanced by the Company uses only the contract guarantee of thirty-six hours of work for a scheduled employee. This formula has no relationship to employees' prior earnings.

Obviously, there is a considerable difference between the Parties on this point. However, there is a reasonable middle ground. Earnings data are available only for the first 142 work days of 1987. For purposes here, such data are sufficient to make an equitable determination. Therefore, a proper formula based on the 142-work day period to be applied to the 119-work day post-sale period can be devised.

In developing a formula, it is necessary to make the basic assumption that had the sale included the protections provided for in the Basic Agreement, the employees would have been paid in the 119-day period essentially on the same basis that they were paid in the 142-day period. This is particularly true since Thanksgiving and Christmas periods are said to be full employment periods for the Ham Processing Industry. Both holidays fell in the 119-day post-sale period. Therefore, a simple formula can be developed that relates the 119 post-sale work days to the 142 pre-sale work days. Since pre-sale gross earnings are known, a daily pay factor of the employees' gross earnings divided by 142 may be determined. This approach has the advantage of reflecting the 142-day work

experience for all employees including any premium hours and hours for which shift differential was paid. This daily pay factor would then be multiplied by 119, yielding the gross amount due each eligible employee. This gross amount would be adjusted according to the guidelines set out as follows.

Offsets Against The Gross Amount Due:

A. Under a reasonable make whole formula, Unemployment Insurance paid to eligible employees should be deducted on the basis that such amounts would not have been forthcoming had the employee continued to work. Therefore, Unemployment Insurance paid to or due an employee in the 119 post-sale period shall be deducted from the gross amount due.

B. Other earnings reported by employees will be offset.

Amounts Not Offset Against The Amount Due:

A. Damages awarded under other litigation such as those resulting from the NLRB Award against the successor employer are not offset.

B. Workers' Compensation and Disability payments are not offset on the basis that these employees are covered only for that portion of the period that they would otherwise have been available and able to work.

Additions:

A. Interest. Employees are entitled to interest. This should not prove to be an additional hardship on Zady Natey inas-

much as Zady Natey received interest over the period on the amounts due the employees. Such interest shall be computed on a quarterly basis at the regular interest rate published for such purposes by the National Labor Relations Board. It should be noted that the Company states that interest should not be paid unless an egregious impropriety was committed. Zady Natey precipitously closed the Plant without notice to the Union and in violation of the Labor Agreement. This was an egregious act. Such interest shall be compounded quarterly and it shall cover the period from initial eligibility for payment to the date of the actual payment of the amount due.

B. Vacation Pay. There is little evidence concerning the manner in which

vacations were paid to employees during 1987. The Company states that vacations were paid. The Union claims that vacations would have been earned by employees for the succeeding year and 1988 vacations should be paid.

From an Exhibit provided by the Company, it appears that slightly over half of the employees were paid 1987 vacations. There is no question that 1987 vacations should be paid. In this regard, if there is any employee who has not been paid a vacation that would otherwise have come due in the 119-day period, that employee shall be paid the vacation pay which was due or would have been due had the Plant not been sold. The manner in which employees become eligible for vacations in succeeding years is not dependent on work in a calendar year

but, rather, is dependent upon 185 days' work following the last vacation. Consequently, if any employee would have earned a 1988 vacation in 1987 under the Collective Bargaining Agreement, such vacation will be paid.

Neither Party raised the matter of the inclusion of vacation pay in the data shown as gross earnings for the individual employees. It seems necessary to deal with this matter lest it become the subject of time-consuming and expensive litigation. Vacation pay is not hourly or daily earnings. If vacation pay were paid in the pre-sale period, it would not have been duplicated in the post-sale period. Therefore, if vacation pay is included in the gross earnings base used in the computation set out above, such amount shall be backed

out of the gross earnings figure for purposes of the daily pay factor.

C. Medical Payments. All medical bills which otherwise would have been paid under Section 10. B. of the Collective Bargaining Agreement will be paid whether or not the employee is entitled to back pay under the formula.

Mitigating The Employer's Liability. It is true that an employee has some obligation to make a reasonable effort to mitigate the employer's liability. However, this obligation is tempered by the circumstances which caused the employees to be out of work in the first place. Zady Natey engaged in sale negotiations over a protracted period. One of the conditions on which the buyer insisted upon that notice of the impending sale not be given

the Union. Another condition set by the buyer was that he would not be required to continue the Collective Bargaining Agreement which was in full force and effect at the time. Zady Natey conceded on the notice issue and resisted for a time on the Agreement issue. However, at the point of sale, Zady Natey sold on the buyer's terms. Employees were informed at the end of the last pre-sale shift on Friday that they no longer held jobs with Zady Natey.

Significantly, Zady Natey provided no employment outreach for the employees. Instead, Zady Natey relied on the State Unemployment Insurance system to find work for the employees under these traumatic conditions. Zady Natey was, at all times, at risk when he decided to sell the Plant under conditions adverse to the employees.

In the main, then, mitigation for these employees may be accomplished by applying for Unemployment Insurance. An employee who is eligible for Unemployment Insurance is represented as being available and willing to work. If the employee is not in that posture, an Unemployment Insurance benefit is not forthcoming.

For these reasons, Zady Natey employees who, at any time during the 119-day post-sale period, applied for or received Unemployment Insurance will be paid back pay under the formula. Employees who were not eligible for Unemployment Insurance for some reason, and would not otherwise be disqualified as covered, shall have their situation reviewed on the basis of the eligibility principles set out herein. Employees who claim receipt of Unemployment

Insurance benefits but estimated those benefits on the Union Questionnaire shall be given the opportunity to prove the amounts claimed.

Any employee who found work in the post-sale period is covered notwithstanding his status in regard to Unemployment Insurance.

Former established Zady Natey employees are not skilled job seekers nor are they expected to have expertise in regard to the completion of complex forms. Because of these circumstances, the employee must be given the benefit of the doubt in applying these guidelines.

Search for a Job. Where an employee did not apply for Unemployment Insurance but shows evidence that he made an effort to find a job, he shall be eligible to have

the formula applied to him. As noted earlier, where an employee found a job in the 119-day period, that employee is a covered employee. Where an employee refused a job, but continued to receive or subsequently received Unemployment Insurance, that employee is covered. Inasmuch as a job offer made by the successor employer was at considerably reduced hourly rates and without the protection and benefits of a Labor Agreement, a refusal of a job offer by the successor employer will not be considered a disqualifier under any circumstances.

The record shows that two employees offered no proof of job search, did not apply for Unemployment Insurance, and did not find work. These employees are not covered unless they can provide proof of a

search or application for Unemployment Insurance.

Laid-off Employees. Certain employees were on layoff as of the date of sale. There is no reasonable way to determine when or if these employees would have been recalled. Consequently, these employees are not covered employees.

Terminated Employees. Three employees were considered to be terminated. These employees are not covered.

Disabled Employee. There is evidence that one employee was released by his doctor from his temporary disability on September 23, 1987. On the basis that this employee would have been returned to full employment on that date had his job existed, he shall be paid an amount equal to his straight-time hourly rate for all work days

from September 23, 1987, through December 31, 1987.

Workman's Compensation. Two employees were on Workman's Compensation. The evidence is that these employees were paid Workman's Compensation benefits during the entire 119-day post-sale period. Under these circumstances, they have no additional entitlement. If either or both employees recovered and were able and available to work during the post-sale period, they shall be paid on the same basis as the recovered Disabled Employee.

National Guard. One employee is said to have been on National Guard Duty at the point of the sale. He shall be considered covered for the period that he was available to work.

Deceased Employee. There is evidence that one employee died one month after the sale. The estate of that employee shall be made whole for the month involved notwithstanding any other circumstances.

Attached is a summary of the various employee circumstances and the status of those employees under the guidelines set out in this letter. I trust that the above will be responsive to the issues raised by the Parties in an attempt to determine a proper and fair settlement of the outstanding issues. It is possible that certain inconsistencies in the evidence may work to the disadvantage of one or two employees. Here, the employees will be given the benefit of the doubt in regard to the application of the guidelines. This Arbitrator has no intention of reopening the

matter for further argument and/or debate. The determinations, in my judgment, are fair and equitable and suit arbitral standards for a make whole determination. The intent here was to be fair and equitable so as to provide neither a windfall for the employees nor a windfall for Zady Natey. It is intended that the Parties will proceed on a reasonable basis without spending time searching out loopholes or minor disqualifying or limiting technicalities in these guidelines. The overriding consideration should, in every case, be that the employees should be compensated for their real loss to the extent possible. In all cases, individual employees shall be permitted to bring forth additional proof to support their claims. The Parties will work out a method which is reasonable in

terms of time and effort to achieve this end.

I trust that this final determination resolves all outstanding matters and that the record may stand closed pending only the calculation and payment of monies due the employees. You have my most abundant thanks for your patience and your competent and kind assistance in dealing with this very complex matter.

Sincerely,

Paul J. Fasser, Jr.
Arbitrator

PJFJr/agf
Enclosure

ATTACHMENT A

SUMMARY OF EMPLOYEE STATUS

SITUATION	STATUS
Found work in post-sale period	Covered
Paid Unemployment Insurance in post-sale period	Covered
Estimated Unemployment Insurance benefit*	Covered
Disabled and recovered (Including Worker's Compensation)	Covered as set out in narrative
Disabled and not recovered	Not covered but no loss of benefits which would otherwise be due
Terminated prior to sale	Not covered
Laid off prior to sale	Not covered
Deceased	Covered
National Guard Leave	Covered if otherwise eligible for back pay
Not eligible for Unemploy-	Covered if

ment Insurance	otherwise eligible for back pay

*An employee who estimated an Unemployment Insurance benefit will be given an opportunity to provide the exact amount of the benefit. If such exact amount cannot be determined, an amount equal to that which would have been paid to that employee for the period involved shall be deducted.